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IN THE

Supreme Court of the United States

October Term, 1940.

315-797

No. 1076. 98

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON and ROBERT B. OUGHTON, Co-Partners Trading as WINDSOR MANUFACTURING COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD

and

THOMAS GIBBS, CATHERINE V. KILMARTIN, VINCENT BOLINSKI, JOHN WEBER and MARY HASSAN.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

CHAS. A. WOLFE,
Counsel for Petitioners.

MONTGOMERY & MCCRACKEN,
Philadelphia, Pa.,
Of Counsel.

International, 236 Chestnut St., Philadelphia

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, John J. Oughton, et al., Co-Partners trading as Windsor Manufacturing Company, pray that a writ of certiorari issue to review the opinions and decrees of the Circuit Court of Appeals for the Third Circuit entered in the above case on February 26, 1941 (R. p. 226), and April 4, 1941 (R. pp. 247-50), respectively; which first mentioned opinion and decree modified and confirmed a

decision and order of the National Labor Relations Board (hereinafter referred to as the "Board"), dated February 9, 1940 (R. p. 1), and which last mentioned opinion settled the form of final decree to be entered therein.

I. OPINIONS BELOW.

The decision and order of the Board is printed at p. 1 of the Record and is not officially reported.

The first opinion of the Circuit Court of Appeals for the Third Circuit (R. p. 200) was filed November 19, 1940, and is reported in 118 Fed. Rep. (2d) 486.

The second opinion of the Circuit Court of Appeals for the Third Circuit (R. p. 226) was filed February 26, 1941, and is reported in 118 Fed. Rep. (2d) 486.

The opinion of the Circuit Court of Appeals for the Third Circuit sur Settlement of Decree (R. p. 247) was filed on April 4, 1941, and is not officially reported.

II. JURISDICTION.

The decree of the Circuit Court of Appeals for the Third Circuit was rendered April 4, 1941 (R. p. 249).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347); and Section 10 (e) of the National Labor Relations Act (29 U. S. C. A., Sec. 160 (e)).

III. QUESTIONS PRESENTED.

1. Does the National Labor Relations Act give the Board power to direct an employer to bargain collectively with a particular union as the exclusive representative of the employees in question when the only evidence in the Record is to the effect that the said union did not represent

a majority of the said employees and there was no competent evidence on the Record from which the Board could find that any loss in membership by the union was the result of any improper conduct on the part of the employer?

2. May a Circuit Court of Appeals properly affirm and enforce such an order of the Board notwithstanding the sworn statement of approximately 80% of the employees in question, (filed with the Circuit Court of Appeals in support of their petition for leave to adduce additional evidence, and for re-argument) to the effect that they do not wish the union in question to represent them and that those of them who formerly were members of the said union and gave up their membership therein did so voluntarily and not because of any action or conduct on the part of the employers?

3. Does a Circuit Court of Appeals have the power to condition its affirmance of an order of the Board directing an employer to bargain with a particular union, upon the Board first ascertaining through an election or any other suitable method that the union in question is still the free and untrammeled choice of the employees as their bargaining agent?

4. After a case has been duly assigned by a Circuit Court of Appeals to three of its Judges who hear argument thereon and render a decision, from which one of said three Judges dissents, is it proper for the Court to direct a re-argument thereof before the Court en banc consisting of two additional Judges who, by joining the said dissenting Judge, reverse the decision of the Court as originally constituted?

IV. STATEMENT OF THE CASE.

Following an organizational campaign among petitioners' employees instituted by the Textile Workers Union of America, C. I. O. (hereinafter referred to as the "Union") begun in May, 1937, a strike was called by the Union in July, 1937, which finally culminated in the holding of an election on January 19, 1938. As stated in the opinion of Judge Goodrich (R. p. 203) the result was as follows: Out of 221 ballots cast, 123 voted in favor of the Union, 85 against it and 13 ballots were not counted either because they were held void or were challenged.

Between January, 1938, and February 13, 1939, numerous conferences were held between representatives of the Union and representatives of the petitioners with respect to various complaints and grievances presented by the Union. The nature of these complaints and the disposition thereof as a result of the said conferences are set forth in the correspondence between the parties and their respective counsel (R. pp. 30-78). This correspondence ends with a letter from petitioners to the Union dated February 13, 1939, wherein petitioners refused to hold a further conference with the Union on the ground that petitioners believed it no longer represented any considerable number of the employees.

Thereupon the Union filed charges against petitioners alleging (a) that petitioners had deprived their employees of the rights guaranteed them by Section 7 of the National Labor Relations Act; and (b) that on certain specified dates petitioners had refused to bargain collectively with the Union or had refused to bargain in good faith with the Union.

At the hearing held by the Trial Examiner a petition bearing the signatures of approximately 75% of petitioners' employees was filed asking that a committee of these petitioners be allowed to intervene in the proceedings. The petition was denied by the Trial Examiner. The only testimony in the record on the question whether the Union still represented a majority of the employees at the time of the hearing was the testimony of the witness Pollock, Manager of the Philadelphia Textile Workers Joint Board. He testified that he thought his Union no longer represented a majority of the workers and that he got his information from the records of the Union (R. pp. 177-8). On cross-examination he was allowed to testify, over objection, that he had been told by two members of the Union that they in turn had been told by other employees that the attitude of the management was discouraging membership in the Union.

The Board subsequently entered its decision and order (R. p. 1) affirming the ruling of the Trial Examiner in denying the committee's petition to intervene, and directing petitioners (a) to cease and desist from depriving their employees of the rights guaranteed them by Section 7 of the Act; and (b) to bargain collectively with the Union as the exclusive representative of their employees.

Upon petition to review, and cross petition to enforce the said order of the Board, the Circuit Court of Appeals allowed the above mentioned committee to intervene so that the propriety of the denial of its right to participate in the proceedings could be considered.

The case was duly assigned by the Circuit Court of Appeals to Judges Maris, Jones and Goodrich, who heard argument and filed their opinion on November 19, 1940 (R. p. 200).

The majority opinion of the Court, written by Judge Goodrich, held (a) that there was sufficient evidence in the record to sustain the Board's finding that the petitioners' employees had been restrained in the exercise of the rights guaranteed them by Section 7 of the Act; (b) that the intervening petitioners should have been allowed to participate in the hearing and present their evidence, and that the Board was guilty of an abuse of discretion in denying the petition; and (c) that in view of the evidence to the effect that the Union no longer represented a majority of the employees and the fact that the committee represented 75% of the employees, that part of the Board's order requiring petitioners to bargain with the Union would be affirmed upon condition that the Board first ascertain through an election, or other suitable method, that the Union was still the free and untrammeled choice of the employees as their bargaining agent. Judge Jones filed a dissenting opinion in which he disagreed with the conclusion of the Court as set forth in (b) and (c) above stated.

Thereafter, the Board filed a petition for re-hearing which was granted with the direction that the matter be argued before the court en banc composed of Judges Maris, Jones and Goodrich, to whom the case had been originally assigned, and in addition, Judges Biggs and Clark. After re-argument, the majority opinion of the Court, written by Judge Jones and concurred in by Judges Biggs and Clark, reversed the original opinion of the Court as to points (b) and (c) above referred to, relying upon the decision of this court in the case of

International Association of Machinists etc. v. N. L. R. B., 61 S. Ct. 83

Judges Goodrich and Maris dissented in an opinion written by Judge Goodrich on the ground that the said *Machinists'* case is clearly distinguishable, and that the Board had no power to make an assumption as to a possible causal relationship between unfair labor practices on the part of the employer and loss in Union membership, when it excluded the testimony of employees who would be in a position to testify to the contrary.

Thereafter a petition was filed with the Circuit Court of Appeals (R. p. 237) bearing the signatures of approximately 80% of the employees averring that enforcement of the Court's decision would deprive them of the rights guaranteed them by Section 7 of the Act, and asking leave to produce testimony which would show that many of them were originally coerced by threats of bodily harm into joining the Union and that their rejection of the Union as their bargaining agent had no relation whatsoever to any conduct or actions on the part of the employers or anyone in their behalf, but represented their free and untrammeled choice, and asking for re-argument based upon such testimony. This petition was denied (R. p. 244).

Forms of final decree were then submitted by the respective parties to the Circuit Court of Appeals and the final decree was ultimately entered April 4, 1941, in accordance with the opinion filed the same day with respect thereto by Judge Jones (R. p. 249).

V. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred as follows:

1. In reversing a decision by a majority of the three Judges of the Court to which the case was originally assigned, after a rehearing before the Court en banc com-

posed of the original three Judges and two additional Judges; and in so construing its rules as to permit such a result.

2. In holding that the Board properly denied the petition of certain employees to intervene in the proceedings in view of the fact that they were not necessary parties.

3. In holding that the Board's exercise of its discretion in excluding any parties other than necessary parties is not subject to review.

4. In holding that the Board was warranted in treating the admitted loss of the Union's majority as immaterial because of the "natural influence" of the employers' alleged unfair labor practices.

5. In holding that the Board might properly rely upon the "presumed continuity of the bargaining agent's majority support", there being unfair labor practices by the employer contemporaneously present, notwithstanding the Board's exclusion of evidence to the contrary.

6. In holding in effect that the inference (which this court has said is permissible) that there is a causal relationship between unfair labor practices on the part of an employer and loss in Union membership when the unfair practices are contemporaneously present, is irrebuttable.

7. In holding that the Board was justified in finding that the only evidence in the record indicated the Union's majority status continued to the date of the complaint and, except for the effect of the petitioners' unfair labor practices, thereafter.

8. In denying to a group composed of a large majority of petitioners' employees the opportunity of producing testimony to show that the Union was at no time the free and untrammeled choice of the majority as their bargaining agent, that many of them were induced to join and vote for the Union as the result of threats of bodily violence, that those among them who had renounced their former membership in the Union did so voluntarily and not because of any action or conduct on the part of petitioners or any of their supervisory employees, and that the Union did not in fact represent a majority of the employees.

9. In refusing to condition any affirmance of the Board's order upon the Board first ascertaining through an election, or other suitable method, that the Union is still the free and untrammeled choice of the employees as their bargaining agent.

10. In affirming, with modifications, the order of the Board.

VI. REASONS FOR GRANTING THE WRIT.

The reasons relied upon for the allowance of the writ are that the Circuit Court of Appeals, in a matter of vital interest to employers and employees generally, (a) has rendered a decision in conflict with the decision of other Circuit Courts of Appeals on the same matter; (b) has decided an important question of Federal law which has not been, but should be, settled by this Court; (c) has decided a Federal question in a way probably in conflict with applicable decisions of this Court; and (d) has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Circuit Court of Appeals, a review of which is herein sought, is based chiefly, we submit, upon an erroneous interpretation of the decision of this Court in the case of

International Association of Machinists etc. v. N. L. R. B., 61 S. Ct. 83.

In that case there was much evidence to the effect that the craft unit there involved had been improperly assisted by the employer, to the detriment of the industrial unit with which the Board directed the employer to bargain. The craft unit challenged the Board's order on the ground that prior to its issuance it had obtained an overwhelming majority of production employees and had so notified the Board, and contended that the Board should have directed an election, upon receipt of such notification. In holding that the Board did not commit error in failing to act upon such request, Mr. Justice Douglas, speaking for this Court, said:

> "The existence of unfair labor practices throughout this whole period permits the inference that the employees did not have that freedom of choice which is the essence of collective bargaining. * * * Where *as a result of unfair labor practices* a union cannot be said to represent an uncoerced majority, the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated. * * * It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining." (Italics supplied.)

The situation presented to this Court in that case differs completely from the situation as presented by the instant case. As stated in the dissenting opinion of Judge Goodrich, there was no competent evidence in this case

that the loss in Union membership was caused by any unfair labor practices on the part of the petitioners. Even though an inference be permitted or an assumption made that there is a causal relationship between unfair labor practices on the part of an employer and the loss of union membership, when the unfair labor practices are contemporaneously present, certainly no court has previously held that there is in such a case an irrebuttable legal presumption of cause and effect.

Certainly it would be a far departure from the accepted and usual course of judicial proceedings to permit such an inference or assumption to be the basis of a decision by a tribunal which specifically rejected and excluded testimony of those who could testify to the contrary and establish that no basis existed in fact for such an inference or assumption.

As this Court has held in numerous cases including

Interstate Commerce Commission v. Chicago R. I. & P. Ry., 218 U. S. 88, 102;

St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 75, 78;

Ohio Bell Telephone Company v. Commission, 301 U. S. 292, 304, 305;

and as recently reiterated by Mr. Justice Stone in the case of

Pittsburgh Plate Glass Co. v. N. L. R. B., S. Ct. .

> "One of the most important safeguards of the rights of litigants and the minimal constitutional requirement, in proceedings before an administrative agency vested with discretion is that it cannot rightly exclude from consideration, facts and circumstances

relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion."

The instant case presents the amazing situation of an administrative tribunal basing its decision upon an inference, after excluding testimony to the contrary, and upon a finding that its decision will effectuate the policies of the Act, although the record shows that there was no basis in fact for the inference and that the decision completely nullifies the policies of the Act by denying to a large majority of the employees in question the rights guaranteed them by Section 7 of the Act "to bargain collectively through representatives of their own choosing."

The basic error underlying the action of the Circuit Court in reversing its earlier decision is that it failed to interpret the legal principles enunciated in the above quoted excerpts from the opinion by Mr. Justice Douglas in the *Machinists* case, and the decision in that case, in the light of the facts there existing; and erroneously interpreted the said decision of this Court to hold that a Circuit Court had no power to condition its affirmance of an order of the Board directing an employer to bargain with a particular Union, upon the Board first ascertaining through an election or any other suitable method that the Union in question is still the free and untrammeled choice of the employees as their bargaining agent.

We submit that the decision in the *Machinists* case cannot properly be so construed. We believe that that point has not been, but should be definitely settled by this Court. Insofar as the point has been involved in cases before this Court such as

N. L. R. B. v. Fansteel Corp., 306 U. S. 240, 261, 262.

we believe the indication to be that the decision of the Circuit Court of Appeals in the instant case is inconsistent with the applicable principles enunciated by this Court.

The instant decision is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of

N. L. R. B. v. P. Lorillard Co., 117 F. (2d) 921.

In that case the Circuit Court of Appeals conditioned its enforcement of the Board's collective bargaining order on the latter's redetermination of the Union's majority, on the ground that the lapse of two years and the organization of a plant union after a strike might have changed the employees' preference. The Board there also relied on the decisions of this Court in the *Machinists* case and in the case of

N. L. R. B. v. Bradford Dyeing Association, 310 U. S. 318.

The Circuit Court held those cases to be distinguishable on the ground that in those cases no facts existed to rebut the presumption of continuity of a once duly chosen bargaining agent's majority support.

We respectfully submit that if the instant decision of the Circuit Court be allowed to stand and the petitioners, in compliance therewith, proceed to bargain collectively with the Union as the sole bargaining agency of all of their employees, against the expressed will and desire of the great majority of such employees, the result would be not only to deprive them of the rights guaranteed them by Section 7 of the National Labor Relations Act, but to make abortive the fundamental policy and plan of the Act for peaceful procedure and the avoidance of industrial strife.

WHEREFORE, your petitioners respectfully submit that this Court should grant its writ of certiorari directed to the said Circuit Court to the end that the said decision of that Court may be reviewed and determined by this Honorable Court, that the said decree of the said Circuit Court may be reversed, and that the petitioners may have such other and further relief as may be proper and just.

Respectfully submitted,

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON and ROBERT B. OUGHTON, Co-Partners Trading as Windsor Manufacturing Company,

By CHAS. A. WOLFE,

Counsel for Petitioners.

MONTGOMERY & MCCRACKEN,
Philadelphia, Pa.
Of Counsel.

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Statute:

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V. Sec. 151, *et seq*:

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 98

JOHN J. OUGHTON, CHARLES T. OUGHTON, BERTRAM E. OUGHTON, AND ROBERT B. OUGHTON, CO-PARTNERS TRADING AS WINDSOR MANUFACTURING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the three-judge court below (R. 200–213) is reported in 118 F. (2d) 486. The opinion of the court below, sitting *en banc* on rehearing (R. 226–237) is reported in 118 F. (2d) 494; the subsequent opinion of the same court on settlement of decree (R. 247–248) is unreported. The findings of fact, conclusions of law, and order

of the National Labor Relations Board (R. 1–29) are reported in 20 N. L. R. B., No. 31.

JURISDICTION

The decree of the court below (R. 247–248) was entered on April 4, 1941. The petition for a writ of certiorari was filed on May 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion for the Board, upon findings that petitioners had refused to bargain with a labor organization designated by a majority of petitioners' employees in an appropriate unit, to require petitioners to bargain with that organization despite a claim that the organization had lost its majority subsequent to the unfair practices.

2. Whether the court below erred in denying a petition for leave to adduce additional evidence, filed by petitioners in No. 170 and subscribed to by a majority of petitioners' employees, alleging that the prior representative had been repudiated by a majority of the employees of their own free will and not by reason of petitioners' unfair labor practices.[1]

[1] This question, we think, may not properly be presented by these petitioners. It is, however, raised by the petition in the companion case, No. 170.

3. Whether a circuit court of appeals may be composed of all the circuit judges in active service, sitting *en banc*.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 5–29). So far as are here material, the facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

On January 19, 1938, pursuant to an agreement between petitioners and the Textile Workers Union of America,[3] herein called the Union, an election was held under the supervision of the Mayor's Labor Board of the City of Philadelphia (R. 13; 31–33). A majority of petitioners' production employees selected the Union as their bargaining representative (R. 13; 34).

Immediately after the election, on January 24, 26, and 28, 1938, the Union conferred with petitioners concerning matters which were in dispute; the Union's proposals were rejected (R. 14–16; 120–121, 154–155). The Union's request for a

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[3] Then called the Textile Workers Organizing Committee.

contract limited to hours of employment, a matter not in dispute, likewise was rejected (R. 15; 152). At the January 28 conference petitioners, who were represented only by their counsel, proposed that bargaining be postponed (R. 15; 120); on February 18 petitioners rejected the Union's request for a conference with respect to the employers' lay-off policy (R. 16; 36–44). Two further fruitless conferences (R. 16–17; 124–125, 139–140) were followed by the employers' announcement in April of a wage reduction (R. 17; 126, 158); the Union was not informed of the proposed wage reduction, and its request to negotiate concerning it was disregarded (R. 17; 51–52, 174–175). Thereafter in June, July, September, October, and November 1938 petitioners persistently evaded the Union's efforts to adjust matters in dispute and to embody the adjustments in a signed agreement (R. 17–25; 127–135, 55–57, 59–62, 64, 65–67). In the latter part of January 1939, petitioners effected an increase in hours of work without prior notice to the Union (R. 21; 135–136, 76), and thereafter rejected the Union's protest and request for a conference, allegedly "in view of our past experience with your failure to keep appointments for conferences arranged with you [4] and our belief that you repre-

[4] On the preceding November 28, a Union representative failed to appear at a conference called by the Board's Regional Director concerning certain charges of discrimination, because he had not been notified in time (R. 20–21; 75–76, 135–136).

sent few, if any, of our employees * * *" (R. 21; 76–78, 135).[5]

Upon the foregoing evidentiary findings the Board concluded that petitioners had engaged in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (R. 21–26). The Board's order required petitioners to cease and desist from these unfair labor practices; to bargain collectively with the Union; to embody any understanding arrived at in a written, signed contract; and to post appropriate notices (R. 28–29).

On February 26, 1940, petitioners filed a petition in the court below to review and set aside the Board's order (R. 178–188), and the employees' committee, petitioners in No. 170, were granted leave to intervene as parties petitioner (R. 190–

[5] This bare assertion, petitioners' first challenge of the Union's continuing majority status, was reiterated in petitioners' answer to the complaint (R. 13). At the hearing certain evidence was adduced (but not by petitioners) with respect to the Union's majority status at that time (R. 13–14; 177–178), and the Trial Examiner denied a petition for leave to intervene, filed by a committee of five employees, which alleged that the committee represented a majority of the employees and were authorized "to represent them in the matter of" the Board's complaint. The question whether the Board abused its discretion in affirming the ruling of the examiner upon the petition to intervene is presented in No. 170, a companion case, in which the employees' committee are petitioners; the petition is set forth in the appendix to the Board's memorandum in opposition in that case.

194). The Board requested enforcement of its order (R. 195–199). On November 19, 1940, the court below, consisting of Judges Maris, Jones, and Goodrich, handed down its opinion directing that the provisions of the order requiring petitioners to bargain with the Union be conditioned upon proof, by an election, that the Union presently represents a majority of the employees and that, with a further modification not here material, the order be enforced (R. 200–209). Judge Jones dissented from the modification of the bargaining order (R. 209–215).

Thereafter, and before any decree was entered, a petition for rehearing filed by the Board (R. 214–222) was granted without dissent by a court composed of all five judges in active service, directing reargument before that court *en banc* (R. 224).[6] On February 26, 1941, the full court handed down its decision enforcing the Board's order, with a modification of the notices provision (R. 226–236). Judges Maris and Goodrich, the majority at the first hearing, dissented in so far as no redetermination of the Union's majority status was required (R. 236–237). Thereafter the court denied a petition filed by petitioners in No. 170, for leave to adduce additional evidence that a majority of the employees had, of their own free will and not be-

[6] Rule 4.1 of the court below provides for such hearings *en banc*.

cause of petitioners' unfair labor practices, repudiated the Union as bargaining representative (R. 237–244). On April 4, 1941, the court filed an opinion (R. 247–248) with respect to the form of, and entered, its decree (R. 249–250).

ARGUMENT

1. This Court has granted a writ of certiorari in a case which presents the question whether the court below may validly act *en banc*. *Textile Mills Securities Corp.* v. *Commisisoner of Internal Revenue,* No. 34, this Term, certiorari granted March 31, 1941. Accordingly, the Government does not oppose either holding the present petition until the decision in the *Textile Mills* case, or granting the writ limited to review of this issue.[7] We respectfully submit, however, that the two other questions do not warrant review.

2. Petitioners contend (Pet. 8, 9, 10–13) that the court below erred in not conditioning enforcement of the order directing them to bargain with the Union upon a showing, by election or otherwise, that the Union now represents a majority of the employees. The contention is meritless; the holding of the court below is in direct accord with the

[7] The *Textile Mills* case is distinguishable in that the petitioner in that case raised in the court below the question of the validity of its *en banc* procedure, whereas the petitioners here did not do so. We do not, however, think the distinction necessarily controlling.

decisions of this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, and *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318. In the *Machinists* case this Court held that it was within the Board's power "to determine how the effect of prior unfair labor practices may be expunged. * * * It cannot be assumed that an unremedied refusal of an employer to bargain collectively with an appropriate labor organization has no effect on the development of collective bargaining," and that it was entirely proper for the Board to refuse to notice a claim of loss or shift of majority until "after unfair labor practices have been removed as obstacles to the employees' full freedom of choice" (311 U. S. at 82, 83). In the instant case, following its uniform practice in such cases, sustained in the *Machinists* and *Bradford Dyeing* decisions, the Board found (R. 25):

> The effect of the respondent's refusal to bargain collectively with the Union was of necessity to discredit the Union so as to discourage the employees from maintaining their affiliation with the Union or from affiliating therewith and from designating it as bargaining representative.

Petitioners seek (Pet. 10–12) to distinguish the *Machinists* case upon the ground that there was no refusal of the Board in that case to take testimony

upon the fact and causes of the claimed loss of majority, and assert that there was such a refusal in the instant case.[8] But, while this Court noted the Machinists' failure to make a showing at the hearing or to ask the court of appeals for leave to adduce evidence, the decision in the *Machinists* case may not be placed upon this ground; the claim of shift of majority was lodged with the Board before its decision issued and its refusal to direct an election was, as this Court recognized (311U. S. at 82), a rejection of the normal method of determining representation, a rejection justified because unremedied unfair labor practices existed.

Petitioners further claim (Pet. 13) a conflict between the decision of the court below and that of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *P. Lorillard Co.*, 117 F. (2d) 921, certiorari granted, No. 71, June 2, 1941.[9] But the Government asked certiorari in the *Lorillard* case only because the decision

[8] Petitioners regard the action of the Board in denying intervention to the employee petitioners in No. 170 as tantamount to such a refusal. A fuller discussion of that point is found in our memorandum in opposition in No. 170.

[9] *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 261, to which petitioners refer (Pet. 12–13), is irrelevant; the loss of majority in that case resulted from non-reinstatement of union members because of their misconduct.

is in conflict with the controlling decisions of this Court in the *Machinists* and *Bradford Dyeing* cases. Under these circumstances, there seems no occasion to review the action of the court below in following the controlling decisions of this Court.[10]

3. The foregoing considerations likewise dispose on the merits of petitioners' claim (Pet. 9) that the court below erred in denying a petition for leave to adduce additional evidence on the question of the Union's loss of majority subsequent to the unfair labor practices. Moreover, these petitioners scarcely can complain of the ruling; the petition was not filed by them but by petitioners in No. 170, and petitioners did not offer any such proof at the hearing before the Board[11] (Cf. the *Machinists* case, 311 U. S. at 81), as the Board and the court below pointed out (R. 14, 227–228).[12]

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[10] It may be that the Court would think it advisable, if it determines to withhold action on this petition until after the decision in the *Textile Mills* case (see *supra*, p. 7), also to await the decision in the *Lorillard* case.

[11] Counsel for petitioners successfully objected to any explanation of the causes of a loss of majority, indicated on direct examination of a Board witness, because opinion evidence was admissible only when "it would be of aid on a factual issue" (R. 177–178).

[12] While the Board would probably have declined to receive such testimony, insofar as it may have related to the period following the unfair labor practices, that probability did not justify petitioners in not raising the point before the Board as Section 10 (e) of the Act requires.

CONCLUSION

With the exception of the power of the court below to sit *en banc,* no question requiring review is presented. If the writ be granted, it is suggested that it be limited accordingly.

Respectfully submitted.

FRANCIS BIDDLE,
Acting Attorney General.
WARNER W. GARDNER,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Associate General Counsel,
ERNEST A. GROSS,
Assistant General Counsel,
FRANK DONNER,
Attorney,
National Labor Relations Board.

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